

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

Claimant

Respondent

Insurance Carrier

Respondent, at the preliminary hearing, asserted claimant had a preexisting lumbar spine condition and failed to prove the April 28, 2014, incident at work was the prevailing factor causing claimant's lumbar injury and need for medical treatment. The December 11, 2014, preliminary hearing Order did not address claimant's request for a myelogram/CT

scan, but indicated claimant's work accident was not the prevailing factor causing his injury, medical condition or disability.

Claimant appeals. Respondent did not file a brief nor a response to claimant's Application for Review.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Following the September 5, 2014, preliminary hearing, the ALJ issued an Order requiring claimant to undergo an independent medical evaluation by Dr. Paul S. Stein. That Order, in part, states:

The court exercises its authority pursuant to **K.S.A. 44-516** and appoints **Dr. Paul Stein** as a neutral physician to do an independent medical examination, who is requested to examine Claimant, review pertinent medical records, and offer opinions as to the following: 1) diagnosis; 2) recommendations for treatment; 3) Claimant's ability to work and, if so, appropriate temporary work restrictions; and 4) whether Claimant's alleged accident of April 28, 2014 is the prevailing factor in causing Claimant's injury, need for treatment or resulting impairment or disability, if any. "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. **Dr. Stein is expressly authorized to perform, or refer Claimant for, such additional diagnostic tests as are reasonably necessary to enable him to provide the opinions and recommendations herein requested.**

...

Claimant's preliminary hearing requests are taken under advisement pending an IME report from Dr. Stein. Counsel will have seven (7) days after receipt of the IME report to offer their written arguments/comments with respect to Claimant's preliminary hearing requests, or to request further evidentiary hearing. Regardless of whether written comments are received, if no request for further hearing is received, the court will proceed to enter an order.¹

Dr. Stein, in his September 30, 2014, IME report, indicated additional testing needed to be completed, specifically lumbar x-rays and a lumbar MRI. He noted that consideration might then be given to a lumbar CT scan or a myelogram/CT scan. The doctor indicated that if the studies showed an acute disc herniation on the left consistent with claimant's

¹ ALJ Order (Sept. 8, 2014) at 1-2.

current symptoms, then there was reason to assume an acute event occurred on April 28, 2014.

After the recommended x-rays and MRI were performed, Dr. Stein, in a November 25, 2014, report, diagnosed claimant with lumbar degenerative disease with a congenitally narrow lumbar spinal canal resulting in spinal stenosis, which preexisted the April 28, 2014, accident. He noted the MRI showed moderate desiccation of the L3-4, L4-5 and L5-S1 discs and a somewhat congenitally narrow spinal canal that resulted in moderate stenosis at L3-4 and L4-5. The doctor noted the MRI also revealed a suggestion of a disc protrusion at L5-S1 centrally and to the right although he could not definitively document any nerve root compression. Dr. Stein noted the MRI was grainy and technically limited by claimant's body habitus.²

Dr. Stein opined claimant's work accident was an aggravation of his preexisting condition and precipitation of symptomatology. The doctor stated:

Without regard to causation, I would recommend a series of left-sided transforaminal epidural injections for diagnostic/therapeutic purposes. Ultimately, further study with a lumbar myelogram/CT scan might be appropriate and surgical intervention would be a consideration only if the symptomatology is intractable and intolerable.³

After receiving Dr. Stein's November 25, 2014, report, both parties submitted written arguments/comments to the ALJ. Respondent requested the ALJ deny the claim, citing Dr. Stein's prevailing factor opinion. Written comment was sent by claimant's counsel to the ALJ by email and stated:

I do not necessarily read Dr. Stein's report in the same fashion as Mr. Townsley. The MRI would seem to indicate there is a disc protrusion at L5-S1. However, because of the poor quality of the MRI I believe that Dr. Stein indicates a Myelogram followed by a CT Scan is appropriate. There is nothing to show that the disc protrusion is related to degenerative disc disease and could well be a new event. That being the case, until the Myelogram/CT Scan is completed, we will really not know causation. We request that the test be provided as the client is suffering from continued pain in his back and lower extremity.⁴

The ALJ, after receiving the aforementioned written arguments/comments, issued his December 11, 2014, preliminary hearing Order. The Order does not address claimant's request for a myelogram/CT scan. The ALJ stated:

² At the preliminary hearing, claimant testified he was 6'3" tall and weighed 444 pounds.

³ Stein report (Nov. 25, 2014).

⁴ Dec. 9, 2014, email from claimant's attorney to the ALJ.

Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment. Claimant has failed to establish that the work-related accident was the prevailing factor in causing Claimant's injury, medical condition or disability. Claimant's current symptoms represent a subjective aggravation of a pre-existing condition, without evidence of a new lesion or change in the physical structure of the body as a result of the claimed accident.⁵

Claimant's Application for Review listed two issues: that the order of the ALJ was contrary to the evidence presented and claimant is entitled to an order for a myelogram/CT scan. In his brief, claimant focused solely on the issue of the myelogram/CT scan. Claimant asserted Dr. Stein was of the opinion a myelogram/CT scan would show what was taking place with the disc protrusion and show if it was compressing a nerve, and only then could prevailing factor be determined.

PRINCIPLES OF LAW AND ANALYSIS

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations the ALJ exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.⁶

Claimant requests additional medical treatment, a myelogram/CT scan, in order to prove whether his disc protrusion is or is not work related. A contention that the ALJ has erred in his finding that the evidence did not show a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 2013 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation.

K.S.A. 2013 Supp. 44-516(a) states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

⁵ ALJ Order (Dec. 11, 2014) at 1.

⁶ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

K.S.A. 2013 Supp. 44-516(a) provides that the ALJ, at his or her discretion, may appoint a neutral health care provider to examine an injured worker and the ALJ may direct the nature of that examination. It is not the ALJ's obligation to order a particular medical test to prove or disprove whether a medical condition is work related. Simply put, the ALJ did not err, as asserted by claimant, by not ordering a myelogram/CT scan to determine causation.

This Board Member notes that the September 8, 2014, Order gave Dr. Stein authority to "perform, or refer Claimant for, such additional diagnostic tests as are reasonably necessary to enable him to provide the opinions and recommendations herein requested." Dr. Stein had the ALJ's approval to request a myelogram/CT scan prior to issuing his prevailing factor opinion, but chose not to do so.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member dismisses claimant's appeal for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of February, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge

⁷ K.S.A. 2013 Supp. 44-534a.

⁸ K.S.A. 2013 Supp. 44-555c(j).